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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL T. CLARE et al.,

Plaintiffs and Respondents,

v.

LISA MacCARLEY,

Defendant and Appellant.

B223107

(Los Angeles County
Super. Ct. No. LP014492)

APPEAL from an order of the Superior Court of Los Angeles County, James A. Steele, Judge. Affirmed.

Law Office of Lisa MacCarley and Lisa MacCarley for Defendant and Appellant.

Law Offices of Michael G. Steiniger and Michael G. Steiniger for Plaintiffs and Respondents.

I. INTRODUCTION

Lisa MacCarley, an attorney, appeals from a February 4, 2010 probate court order awarding her only \$7,500 in attorney fees for services provided to Carl F. Gieseke, the former trustee, of the Carl F. Gieseke and Marjorie L. Gieseke Living Trust dated December 1, 1994 (“the trust”). Ms. MacCarley had sought \$36,000 in attorney fees. The other principal parties in the trust litigation are two remainder beneficiaries, Michael T. and Kathleen A. Clare, who objected to an award of any fees to Ms. MacCarley. We affirm the attorney fee award in all respects.

II. BACKGROUND

In 1994, Mr. Gieseke was married to Marjorie, who died in April 1996. On December 1, 1994, Mr. Gieseke and Marjorie¹ created the trust. Mr. Gieseke and Marjorie were co-trustees of the trust. The trust property included a home located at 2454 Teasley Street in La Crescenta, California. Mr. Clare was designated as the successor trustee. Section 1.03 of the trust provides it was to become irrevocable upon the death of either Mr. Gieseke or Marjorie. Section 2.04 of the irrevocable trust provides that upon the surviving trustor’s death, 90 percent of the trust assets would be equally distributed to Mr. Gieseke’s adult son, Peter Gieseke, and Marjorie’s adult children, the Clares. The remaining 10 percent of the trust assets were to be distributed to charity.

The trust also contains a support provision for Mr. Gieseke and Majorie in section 2.03: “Should either Trustor be at any time in need, for any reason, of funds for proper care, support or maintenance, the Trustees may pay to or apply for the benefit of the Trustors, in addition to the net income of the Trust Estate, such amounts from the

¹ For purposes of clarity and not out of any disrespect, Mr. Gieseke’s two spouses will be referred to by their first names.

principal of the Trust Estate, up to the whole thereof, as the Trustees may from time to time in their discretion, deem necessary or advisable for the proper care, support, or maintenance of the Trustors.” Section 3.02 of the trust gives the trustees, Mr. Gieseke and Marjorie, executive powers. Section 3.02 of the trust states in part: “The Trustees shall . . . have [the] power . . . to (a) Sell, convey, exchange, convert, improve, repair, manage, operate and control [trust property]. . . . [¶] (c) Encumber or hypothecate for any trust purpose by mortgage, deed of trust, pledge or otherwise. [¶] (f) Invest and reinvest the trust funds in such property as the Trustee may deem advisable, whether or not of the character permitted by law for the investment of trust funds.”

A. The Litigation Commencing June 5, 2009

1. The Clares’ petition

On June 5, 2009, the Clares filed a petition which sought: cancellation of a deed recorded September 29, 2008 transferring title in the Teasley Street home from the trust to Mr. Gieseke and Perservanda as joint tenants; to remove Mr. Gieseke as trustee of the trust appointment of a successor trustee; an accounting; and damages. The Clares’ petition alleged that on February 20, 2004 Mr. Gieseke married Perseveranda. On September 18, 2008, Mr. Gieseke conveyed the Teasley Street home, which was trust property, to himself and Perseveranda as joint tenants. The Teasley Street home was conveyed as a gift from the trust to Mr. Gieseke and Perseveranda. The petition further alleged Mr. Gieseke subsequently encumbered the Teasley Street home. Mr. Gieseke then used the proceeds from the Teasley Street home loan to purchase property located at 6112 Atoll Avenue in Van Nuys, California. However, Mr. Gieseke and Perseveranda took title to the Atoll Avenue property as joint tenants. The Clares recorded lis pendens notices on the Teasley Street home and Atoll Avenue properties on June 5, 2009.

On August 3, 2009, Ms. MacCarley on behalf of Mr. Gieseke, filed objections to the Clare’s June 5, 2009 petition. In the verified objections, Mr. Gieseke indicated that,

when he and Marjorie were married, they merged their assets. Mr. Gieseke sold his residence and used the sale proceeds for his and Marjorie's mutual benefit. The trust was never intended to restrict or monitor Mr. Gieseke's use of trust assets. According to Mr. Gieseke, sections 2.03, 2.04, 3.02, and 3.03 of the trust gave him the right to utilize trust property for his support. Many of the same facts and claims were repeated in Mr. Gieseke's objection, which had been previously made in the August 3, 2009 distribution application. Mr. Gieseke asserted the only issue remaining to be resolved was whether Mr. Clare should be appointed successor trustee. Mr. Gieseke objected to Mr. Clare's appointment as successor trustee. The August 3, 2009 objection alleges: "[T]here is the [obvious] conflict of interest inasmuch that [Mr. Clare's] primary concern is [not Mr. Gieseke,] but rather [his] inheritance. [Mr. Clare] has always been contentious towards [Mr. Gieseke] and his involvement in [Mr. Gieseke's] life would be extremely detrimental [to Mr. Gieseke's] emotional and physical well-being." On June 18, 2009, Mr. Gieseke proposed a settlement which Mr. Clare rejected. Mr. Gieseke proposed: he would choose a professional fiduciary to render annual accountings; the proceeds from the sale of the Teasley Street home would be transferred to the successor trustee; and title to the Atoll Avenue property would be immediately transferred to the trust.

2. Mr. Gieseke's first ex parte application

On July 1, 2009, Ms. MacCarley filed an ex parte application for an order directing delivery of funds to Mr. Gieseke, either individually or as the trustee of the trust. The application was filed on behalf of two clients. Ms. MacCarley filed the first ex parte application on behalf of *both* Perseveranda and Mr. Gieseke, individually and in his capacity as trustee of the trust. The application: cited section 2.04 of the trust which allowed the trustee to use trust assets for support for the trustor (as noted Mr. Gieseke was both a trustor and a trustee); referenced section 3.02 which allowed the trustee to transfer by title to trust assets for trust purposes; and asserted the trust gave Mr. Gieseke,

who was then 83 years old, the right to use the assets without any restriction or monitoring. The ex parte application provides: “[The Clares] are disgruntled that Mr. Gieseke has transferred real estate (the modest residence in La Crescenta) that was held in trust to himself and his wife. Mr. Gieseke had incurred a huge debt due to his medical needs and Mr. Gieseke also used approximately \$170,000.00 as a [down payment] to purchase a substitute home and business in Van Nuys.” The ex parte application further indicated that Mr. Gieseke intended to sell the Teasley Street home. Mr. Gieseke was allegedly without resources and needed caregiver expenses, funds for relocation to the Atoll Avenue property, food and other basic necessities of life. The Atoll Avenue property was alleged to be in default. The application indicated Mr. Gieseke would convey title of the Atoll Avenue property back into the trust but needed access to \$100,000 that would result from the sale of the Teasley Street home. Mr. Gieseke and Perseveranda requested release of money from the trust which was being held in Ms. MacCarley’s client trust account. Alternatively, Mr. Gieseke and Perseveranda requested approximately \$50,000 for support, care and maintenance of him for six months. Mr. Gieseke filed a declaration stating both houses were in default. The Atoll Avenue property had been purchased to run an elder care business.

The Clares opposed the ex parte application of Mr. Gieseke and Perseveranda. The Clares asserted that section 2.03 of the trust provides that trust assets are to be used for Mr. Gieseke’s “proper” care, support and maintenance. The Teasley Street home was Marjorie’s long time family residence, which at the time of her death had more than \$600,000 of equity. The conveyance of the Teasley Street home to Mr. Gieseke and Perseveranda as joint tenants as a gift violated the trust terms and divested the beneficiaries of distribution rights after his death. The Clares argued Mr. Gieseke had violated his trust duties by encumbering the Teasley Street home with a total of \$449,000 in loans and using the proceeds to purchase a business property. Mr. Gieseke was able to provide for his care, support and maintenance with his: social security income; pension income; and interest income from a Merrill Lynch brokerage account. Mr. Gieseke had

not shown a need for the type of additional expenditures which were being made with trust assets.

On July 1, 2009, the probate court signed a stipulation providing the parties had agreed to the sale of the Teasley Street home with the proviso that Ms. MacCarley would hold the proceeds in her client trust account. The probate court denied Mr. Gieseke's ex parte application to release funds to him as unsupported by affirmative evidence, which showed irreparable harm or immediate danger. The probate court also found there was no showing of any statutory basis for relief.

B. The July 23, 2009 Petition to Remove Mr. Gieseke as Trustee

On July 23, 2009, Mr. Clare filed a petition to remove Mr. Gieseke as trustee. Mr. Clare sought appointment as temporary trustee. The July 23, 2009 petition alleged Mr. Gieseke should be removed as trustee pursuant to Probate Code² section 15642 for breach of his trust duties. Mr. Clare requested he be appointed temporary trustee pursuant to section 16420, subdivision (a)(4) to take possession of trust property including \$105,000 from the proposed sale of the Teasley Street home.

C. Ms. MacCarley's Second Ex Parte Petition

On August 3, 2009, Ms. MacCarley on behalf of Mr. Gieseke, as trustor and trustee, filed an ex parte application for distribution of funds: to cure mortgage defaults on the Atoll Avenue property in the amount of \$33,151.23; for his care, maintenance and support for three months at the rate of \$5,000 per month; for his unpaid care and expenses in the amount of \$9,982.46 plus \$1,375.79 for utilities bills where he resides; and for attorney fees payable to her in the amount of \$20,000.

² All further statutory references are to the Probate Code.

The August 3, 2009 ex parte application alleged that in July 2005, Mr. Gieseke, at age 79, fell and broke his right hip. Mr. Gieseke needed 24-hour care and physical therapy two to three times a week until September 2005. Due to frail ambulation, Mr. Gieseke needed a full-time caregiver. Mr. Gieseke incurred huge medical expenses from 2005 to the present. Beginning in August 2005, Mr. Gieseke allegedly utilized the Teasley Street home's equity to pay for his increased care, support and maintenance costs and for improvements and repairs to the residence. Mr. Gieseke obtained loans in the following amounts: a \$50,000 line of credit in August 2005; a \$104,838.34 loan secured by a trust deed in July 2006; and a \$217,926.22 in June 2008. Mr. Gieseke's August 3, 2009 ex parte application alleged that July 2006 and June 2008 loan proceeds were used to pay: his medical bills; for a personal automobile for him; off prior loans secured by the Teasley Street home; and off his credit card advances. The ex parte application further alleged that in July 2008, Mr. Gieseke applied for a new loan with Downey Savings and Loan. The bank allegedly required the Teasley Street home to be transferred from the trust into the names of Mr. Gieseke and Perseveranda as husband and wife as a condition of approving the loan. In September 2008, Mr. Gieseke and Perseveranda obtained a loan for \$449,000 from the bank. One-half of the \$449,000 was used to pay off the prior \$217,926.22 loan.

Also in July 2008, Mr. Gieseke and Perseveranda entered into a purchase contract for the Atoll Avenue property for \$575,000 as an investment property. The Atoll Avenue property was allegedly purchased by Mr. Gieseke as an investment property for the trust. The investment plan was to open a six-bed board and care facility known as Alex Care Villa for the elderly. Income from the business would be used to pay off mortgages on the Teasley Street home and Atoll Avenue properties. To purchase the Atoll Avenue property, Mr. Gieseke paid \$174,975.32 in cash using loan proceeds secured by the Teasley Street home trust property. Mr. Gieseke and Perseveranda took title to the Atoll Avenue property in their names as joint tenants by grant deed on September 29, 2008. The ex parte application also alleged that the trust had loaned Alex Care Villa \$55,361.50 as start up costs. However, the business venture was unprofitable and on April 30, 2009,

a default notice was recorded against the Atoll Avenue property. Mr. Gieseke requested over \$33,151.23 to cure the default for the Atoll Avenue property. As previously noted, Mr. Gieseke admitted he purchased the Atoll Avenue property with trust loan proceeds. However, he had the Atoll Avenue property conveyed to himself and Perseveranda.

The Clares opposed the August 3, 2009 ex parte application to distribute proceeds. They argued: the same ex parte application had previously been denied by the probate court; there was no emergency justifying an ex parte application; there was a total of \$424,000 in unaccounted for funds; and Perseveranda had undisclosed income and assets which could be available for the couple's support. The Clares further asserted Mr. Gieseke and Perseveranda were attempting to loot the trust's remaining funds. This was after Mr. Gieseke admitted conveying trust property to himself and Perseveranda, as a gift. Mr. Gieseke also admitted purchasing the Atoll Avenue property with proceeds from a loan secured by trust property, the Teasley Street home. Mr. Gieseke refused to provide financial information or documents. The Clares also requested sanctions for the August 3, 2009 ex parte application because: it was frivolous; the probate court had denied an ex parte application on July 1, 2009; no emergency had arisen since July 1, 2009; and Mr. Gieseke refused to account for the missing money. On August 4, 2009, the probate court denied the ex parte application without prejudice and reserved the sanctions issue. Ms. MacCarley was ordered not to distribute any funds from the client trust account without a probate court order.

D. The August 18, 2009 Order Appointing A Temporary Trustee

On August 18, 2009, the probate court appointed a professional fiduciary, Francine Teitelbaum, as temporary trustee. The order stated: "[Ms. Teitelbaum] is to coordinate with and take possession of designated funds currently being held in Ms. MacCarley's client trust account, and to determine the extent of all outstanding bills for a report to the court at the earliest possible time. [Ms. Teitelbaum] is to be advised that it is not the court's current intention to have any payments made from those funds to

the extent those would relate to operation of the business being operated upon the real property by or with Perseveranda Gieseke.”

E. Ms. Teitelbaum’s September 17, 2009 Report

On September 17, 2009, Ms. Teitelbaum filed a report and request for instructions. Ms. Teitelbaum met with Ms. MacCarley on August 26, 2009. The report stated Ms. MacCarley obtained a cashier’s check for \$34,021.65 to avoid the loss of the Atoll Avenue property. The payment was made without objection from counsel for the parties. Ms. MacCarley tendered a check to Ms. Teitelbaum in the amount of \$71,129.28. Ms. MacCarley withheld \$2,300 which she said was to be used to pay for Mr. Gieseke’s caregiver. Ms. Teitelbaum requested an order directing Ms. MacCarley to release the \$2,300 to the trust.

After meeting on September 2, 2009, the parties agreed to the terms and scope of Ms. Teitelbaum’s temporary duties including paying bills to support Mr. Gieseke that are unrelated to Alex Care Villa’s business activities. Ms. Teitelbaum was also to obtain documents and to determine what trust funds were spent on Alex Care Villa and for Mr. Gieseke’s support and maintenance. Ms. Teitelbaum was also to document a secured loan between the trust and Perseveranda, as operator of the Alex Care Villa. A determination was to be made as to the viability of Alex Care Villa, including whether the Atoll Avenue property and the business should be maintained or liquidated.

Ms. Teitelbaum reported that Mr. Gieseke’s caregiver, Marlon Mariano, was an undocumented alien without a social security card or a California driver’s license. Mr. Mariano was performing full-time services without workers’ compensation coverage. Ms. Teitelbaum also was concerned about making payments to Mr. Mariano for his services. Mr. Gieseke advised Ms. Teitelbaum that Mr. Mariano was running the board and care facility. Ms. Teitelbaum noted this information was “contrary to Ms. MacCarley’s report” and Perseveranda’s representations. Perseveranda was unable to account for Mr. Gieseke’s income. Ms. Teitelbaum stated that Ms. MacCarley had

presented Mr. Gieseke's income as a total of \$2,578.65 in prior pleading.

Ms. Teitelbaum reviewed Perseveranda's expenses, as presented by Ms. MacCarley, and allocated them as Mr. Gieseke's costs and those related to Alex Care Villa.

Mr. Gieseke's income exceeds his expenses by at least \$1,000 per month.

Ms. Teitelbaum reported that Mr. Gieseke would be adequately cared for at a properly maintained board and care facility where he would not require 24-hour care 7 days a week. Transferring Mr. Gieseke to an appropriately licensed facility would reduce the costs of his care by 30 percent. Ms. Teitelbaum concluded there were no outstanding bills which exceeded Mr. Gieseke's income. Ms. Teitelbaum reported Perseveranda should be responsible for any outstanding bills because the trust had recently paid \$34,000 on the Atoll Avenue property to keep it out of foreclosure. Alex Care Villa had not paid any rent or costs since February 2009.

Ms. Teitelbaum requested an order allowing the sale of the Atoll Avenue property. Ms. Teitelbaum reported Alex Care Villa was not a viable business. Perseveranda was not licensed to run such a facility and was operating under the license of the previous owner. Ms. Teitelbaum was unable to contact the previous owner whose only telephone number had been disconnected. Perseveranda stated the trust was leasing the business and she was the administrator. Perseveranda and Mr. Gieseke needed \$31,000 to buy their own license. No taxes were being withheld for the workers, who were allegedly "independent contractors." Nor was there any workers' compensation insurance coverage. Further, Ms. Teitelbaum reported: there was no liability insurance for the business; the workers sleep in a converted garage and are on the premises full-time; although Perseveranda claimed their personal automobiles were not used by the business, Mr. Mariano drove Mr. Gieseke's car for facility needs; the trust was being placed at substantial risk and exposure from the lack of insurance and compliance with employment law; Perseveranda left for a trip to the Philippines without paying the September 2009 mortgage on the Atoll Avenue property; and Perseveranda was using Mr. Gieseke's excess income to carry the business but was unable to pay the mortgage.

Ms. Teitelbaum reported that she could not complete an analysis of the dissipation of trust fund by Mr. Gieseke and Perseveranda, particularly for the year 2008. However, Ms. MacCarley admitted Perseveranda spent \$100,000 on Alex Care Villa facility. No records had been provided for the Merrill Lynch brokerage account or several bank accounts.

Mr. Gieseke, through Ms. MacCarley, responded to Ms. Teitelbaum's report and request for instructions. Mr. Gieseke objected to the sale of the Atoll Avenue property so the business could pay rent to the trust to cover the mortgage. Mr. Gieseke objected to the report to the extent it was suggested he and Perseveranda should repay money to the trust. Mr. Gieseke claimed any assertion Perseveranda had hidden assets was a ploy to keep "badly needed money" away from him. Mr. Gieseke requested \$28,000 to pay Ms. MacCarley's attorney fees. Mr. Gieseke also requested \$6,000 to pay Mr. Mariano. Mr. Gieseke requested permission to appoint someone other than Ms. Teitelbaum as permanent successor trustee.

Ms. MacCarley filed a declaration outlining her efforts to settle the matter prior to Ms. Teitelbaum's appointment. According to Ms. MacCarley, the probate court had improperly focused on the inheritance portion of the trust as opposed to the support provisions in denying the two ex parte applications for distribution of funds. Ms. MacCarley found nothing amiss in Mr. Mariano's undocumented alien status and had paid him from her own funds. Ms. MacCarley also described the difficult relationship with Ms. Teitelbaum. Additionally, the relationship with Joel Simon, Ms. Teitelbaum's attorney, was similarly difficult.

In reply, Ms. Teitelbaum argued, among other things, Ms. MacCarley should not receive any attorney fees. Ms. Teitelbaum argued Ms. MacCarley's services had not benefited the trust. Instead, Ms. MacCarley was engaging in a conflict of interest. This was because Ms. MacCarley continued to defend Perseveranda's conduct as it related to the trust property. Ms. MacCarley had misinformed the probate court about where and how trust funds had been utilized and "parroted" Perseveranda without any independent analysis or verification. Ms. Teitelbaum argued Ms. MacCarley had represented in

documents Perseveranda spent \$70,000 to \$80,000 to start the elder care venture and borrowed about \$50,000 for the license. However, Ms. MacCarley subsequently admitted that Perseveranda does not own the elder care business or the license.

Ms. MacCarley admitted she had not reviewed all the documents for the business.

Ms. MacCarley submitted a budget which stated Mr. Gieseke's living expenses exceeded his income. Ms. Teitelbaum revealed the contrary that was true. In fact, Mr. Gieseke's income actually exceeded his expenses. Mr. Gieseke was also funding a business that Perseveranda admitted she did not own. Perseveranda had "stymied" Ms. Teitelbaum's ability to trace trust funds by refusing to provide documentation. Ms. Teitelbaum also noted Ms. MacCarley admitted disbursing \$2,500 to Mr. Mariano without a probate court order. According to Ms. Teitelbaum, this was a violation of the prior probate court order regarding the funds held in Ms. MacCarley's client trust account. Ms. Teitelbaum clarified that her position on paying Mr. Mariano related to whether he had been hired by Perseveranda to work for her Alex Care Villa. However, Mr. Mariano was being paid with trust funds.

The Clares objected to the fee request because: Ms. MacCarley had not cooperated with efforts to assist Ms. Teitelbaum to trace missing trust funds; her advocacy had been adverse to Mr. Gieseke and the trust; and her actions were designed to benefit Perseveranda. On October 2, 2009, the probate court deferred hearing on the attorney fee request to December 1, 2009.

F. Ms. Teitelbaum's November 23, 2009 Report

On November 23, 2009, Ms. Teitelbaum filed a second report and request for further instructions. The report states that numerous payments had been made from the trust but could not be substantiated or were to Perseveranda's benefit. The payments were not made for Mr. Gieseke's benefit. It was reported that \$23,845.95 in trust funds had been used to pay Rachel Perea, the licensee of Alex Care Villa, for services rendered. However, the payment was made in violation of the probate court's instructions that trust

funds were not to be used for operation of Alex Care Villa. Also, caregiver payments made from the trust fund to Mr. Mariano could not be substantiated as being for Mr. Gieseke. This was because the services were not only for Mr. Gieseke but were also for other residents at Alex Care Villa.

G. The December 1, 2009 Partial Settlement

At the December 1, 2009 continued hearing, the parties entered into a settlement agreement whereby Mr. Clare would be appointed permanent successor trustee. The parties also agreed to waive recovery against Mr. Gieseke for misappropriation of trust assets by him. Mr. Clare reserved his rights to pursue claims against Perseveranda. The parties agreed to submit the issues of Ms. MacCarley's fees to the probate court by declarations. The probate court subsequently entered an order approving the settlement agreement and release.

H. Ms. MacCarley's Attorney Fee Request

On December 10, 2009, Ms. MacCarley requested \$36,000 in attorney fees. Ms. MacCarley asserted the probate court, Ms. Teitelbaum and the Clares had erroneously focused on the inheritance as opposed to the Mr. Gieseke's needs. Ms. MacCarley further argued the aforementioned persons "were intent on 'prosecuting'" Mr. Gieseke, Perseveranda and Ms. MacCarley. In a declaration, she reiterated the acrimonious nature of the proceedings. Ms. MacCarley also stated she had attempted to settle the matter and had acted to transfer title to the Atoll Avenue property to the trust. The Clares objected to Ms. MacCarley's fee request on the ground the services she performed were of no value to the trust. According to the Clares, because of Ms. MacCarley's actions, the trust's value had declined to nearly zero.

I. The February 20, 2010 Order

On February 20, 2010, the probate court entered a minute order granting and denying in part Ms. MacCarley's fee petition. The probate court ruled: "Firstly, the court notes that the manner of presentation of the [fee application] made it more difficult for the court to determine the necessary facts in order for the court to make its findings. The court also notes that [Ms. MacCarley] expressed surprise that the matter was ever first presented to, much less entertained by, the court. [Ms. MacCarley] portrays this as the court having improperly focused on the dissipation of the Clares' inheritance rather than [Mr.] Gieseke's needs. It would appear that [Ms. MacCarley], in her zealous advocacy has lost objectivity. It cannot be ignored that [Mr.] Gieseke was and is an income beneficiary and, as Trustee, he bears a fiduciary duty to preserve the principal for the benefit of the residual beneficiaries. The court was presented with what convincingly appeared to be, at a minimum, a failure to keep the beneficiaries reasonably informed of the trust and its administration. There was significant evidence presented at the outset to indicate the possibility of something far worse than merely failing to keep the beneficiaries informed. The family residence, previously unencumbered, had been repeatedly encumbered, a significant portion of the loan proceeds therefrom were unaccounted for and some portion of those funds were apparently invested in the purchase of a board and care business belonging to [Mr. Gieseke's] wife. Although the funds so expended were supposedly made through one or more loans, the Trustee failed to ensure the loans were properly documented. It was argued that [Perseveranda] effectively assumed the role of Trustee and manipulated the Trustee and the Trust in a manner to the detriment of the residuary beneficiaries (as well as the income beneficiary) in direct contravention of the Trust's terms and intent. Given [Mr. Gieseke's] age and condition, it is simply not reasonable to assume he intended to engage in the board and care business (or any other business enterprise for that matter). If [Perseveranda] chose to do so nothing would stop her from using her own income and assets to acquire and

operate Alex Care Villa however the assertions was that she instead used Trust assets. That assertion was never effectively refuted.”

The probate court continued: “This court recalls that when presented with [Mr. Gieseke’s] declaration referring to [Perseveranda’s] independently derived income in response to the claims that Trust assets were being improperly utilized, the court inquired but was never presented with any evidence whatsoever supporting the accuracy of [Mr. Gieseke’s] assertion. In any event, there was significant evidence that [Perseveranda] may have improperly established and operated Alex Care Villa and more importantly, that she, or those on her behalf, may have drained money from the Trust. In what appeared to be an effort to divert attention away from the real issues, it was argued that any failure to essentially fund [Perseveranda’s] board and care business would be to punish [Mr. Gieseke]. Although that might be an emotionally appealing argument, based upon all of the proceedings to date, it is a position that appears to have been without merit.”

The probate court continued: “Having witnessed the manner in which the litigation has proceeded thus far, the court is convinced that little of the effort represented by the Petition benefitted the Trustee or the Trust. The primary beneficiary of those efforts appears to have been [Perseveranda]. With the sole exception [of \$7,500 pertaining to efforts to resolve the matter] neither the labor generated nor the size of the Trust Estate justify granting [the petition for \$36,000].” The probate court approved attorney’s fees and costs in the amount of \$7,500 pertaining to Ms. MacCarley’s efforts to resolve the matter. The fee petition was denied in all other respects. This timely appeal followed.

III. DISCUSSION

Ms. MacCarley contends the probate court abused its discretion in denying her fee request of \$36,000 and awarding only \$7,500 in total fees for legal services rendered to Mr. Gieseke. Attorney’s fees and litigation costs, which are incurred in the trustee’s

successful defense of an action brought by a beneficiary, are recoverable. (*Estate of Gump* (1991) 1 Cal.App.4th 582, 604; *Estate of Cassity* (1980) 106 Cal.App.3d 569, 574.) The Court of Appeal has explained: “The underlying principle which guides the court in allowing costs and attorneys’ fees incidental to litigation out of a trust estate is that such litigation is a benefit and service to the trust.” (*Dingwell v. Seymour* (1928) 91 Cal.App. 483, 513; accord *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 269-270; *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461; *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1314.) The Court of Appeal has noted: “‘If litigation is necessary for the preservation of the trust, the trustee is entitled to reimbursement for his or her expenditures from the trust; however, if the litigation is specifically for the benefit of the trustee, the trustee must bear his or her own costs incurred, and is not entitled to reimbursement from the trust.’ [Citation.]” (*Donahue v. Donahue, supra*, 182 Cal.App.4th at p. 270, quoting *Terry v. Conlan, supra*, 131 Cal.App.4th at p. 1461.) In addition, the trust may not be charged with fees incurred under some circumstances such as where the trustee mismanaged assets or breached his or her duties unless the challenged actions resulted in a benefit to the trust. (§ 15684; *Estate of Gump, supra*, 1 Cal.App.4th at p. 605; *Estate of Vokal* (1953) 121 Cal.App.2d 252, 258-261; *Metzenbaum v. Metzenbaum* (1953) 115 Cal.App.2d 395, 401-402.) The determination to allow attorney fees rests in the sound discretion of the probate court. The probate court’s ruling will not be disturbed on appeal “unless they appear so clearly out of proportion” to the legal services provided. (*Estate of Beach* (1975) 15 Cal.3d 623, 645; *Estate of McLaughlin* (1954) 43 Cal.2d 462, 465; *Donahue v. Donahue, supra*, 182 Cal.App.4th at pp. 268-269; *Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 234; *Estate of Gump, supra*, 1 Cal.App.4th at p. 596; *Estate of Cassity, supra*, 106 Cal.App.3d at p. 572.)

No abuse of discretion occurred. Ms. MacCarley initially appeared as Perseveranda’s counsel. Perseveranda was not named in the trust nor its purposes. Throughout the proceedings, Ms. MacCarley made representations to the probate court about Mr. Gieseke’s expenses, trust expenditures and trust assets that Ms. Teitelbaum reported were untrue. Ms. Teitelbaum reported Ms. MacCarley’s actions were hindering

efforts to marshal and trace trust assets. Further, Mr. Gieseke, as trustee, conveyed the Teasley Street home to himself and his new wife in violation of trust provisions. Trust assets were used to purchase the Atoll Avenue property and operate a business owned and operated by Perseveranda. No doubt, Ms. MacCarley argued that Mr. Gieseke should receive support from trust assets. The probate court could reasonably find though that Ms. MacCarley advanced Perseveranda's interests. There is evidence Perseveranda and Mr. Gieseke dissipated the trust's assets over a short period of time all or mostly to her benefit. Perseveranda's interests (in depleting the trust assets) were diametrically opposed to the interests of the trusts, i.e., Mr. Gieseke's support and the remainder benefits. Furthermore, the trust provided for support for Mr. Gieseke but it also contained remainder benefits to others, including the Clares. A probate court has the authority and a duty to act to protect the interests of remainder beneficiaries under a trust or to redress a breach of the instrument. (§§ 24, 16060-16061, 17200; *Salter v. Lerner* (2009) 176 Cal.App.4th 1184, 1189; *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427; *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 523-525; *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 620, 624.) The probate court did not abuse its discretion in limiting Ms. MacCarley's fees and costs to efforts which benefited the trust.

IV. DISPOSITION

The order under review is affirmed. Michael T. and Kathleen A. Clare are to recover their costs incurred on appeal from Lisa MacCarley.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.